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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1234

PATRICIA R. HARRIS, Secretary of Housing and Urban Development, *et al.*,

*Petitioners.*

*v.*

BARBARA ROSS, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Respondents (Tenants) are tenants of the Uplands Apartments, Baltimore, Maryland, a 989 unit housing project that receives interest-reduction assistance pursuant to Section 236 of the National Housing Act. They commenced this suit against the Petitioner, Secretary of Housing and Urban Development, (The

Secretary) and others[1] in the United States District Court for the District of Maryland, requesting prospective implementation of an operating subsidy program for the project[2] so that they would not be required to pay the 18% rental increase which had been previously approved by the Secretary. The 18% rental increase meant that Tenants would have to pay more than 30% of their adjusted gross income in rent. Relative to the size of the apartment unit, the rent would be increased by $14 to $23 per month for each tenant family. Tenants were unable to pay this increase and knew that unless Uplands received an operating subsidy, they would be summarily evicted in favor of higher income tenants who could pay.

The statutory backdrop for the Tenants' suit was succinctly presented by the District Court below:

> "The 1974 Housing Act was designed to deal with problems which had occurred in the administration of federal housing programs since the 1968 Housing Act. Section 212, and in particular the subsections at issue here, subsections (f)(3) and (g), were intended to give the Secretary authority to adjust the subsidies for Section 236 project owners in order to meet increased operating costs. Under the 1968 Housing Act, the Secretary lacked authority to make such adjustments, with the result that increased operating costs were passed

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[1]The project owner, Community Services, Inc., other private persons, and other HUD officials were named as parties defendant (App. C., infra, p. 6a).

[2]The operating subsidy program, 12 U.S.C. (Supp. V) 1715z-1(f)(3), would provide for periodic payments on behalf of tenants who pay more than 30% of their adjusted gross income in rent to the owner of a qualifying housing project to offset increases in utility charges and local property taxes.

along from time to time in toto to tenants as increased rental charges.

The concern of the Congress about the effect of increased costs and resulting increased rents in Section 236 projects and its intent in enacting Section 212 of the 1974 Housing Act are expressed in the Senate Report which accompanies the Senate version of the Act, which was the one finally enacted.[3]

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[3]The Report in part is as follows:

"The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments.

While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance, and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A) the amount by which the sum of the cost of utilities, maintenance and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community.

[footnote continued]

As the District Court below concluded:

> The very situation envisioned by Congress has occurred here. Increased operating costs at Uplands have resulted in increased rents, which the record shows are entirely justified. Yet the low income tenants affected are unable to pay all or a part of such increased rents and may now face eviction. It was precisely this problem which led Congress to pass the 1974 amendments and to direct the Secretary of HUD to set aside excess rentals collected to pay operating subsidies where the conditions of the statute were met.

"The Secretary's reading of the Statute", said the District Court below, "miscomprehends the discretion conferred on her by Congress in amending Section 236(f) and (g). . . . Undoubtedly, the Secretary under Section 236(f)(3) has the discretion to determine whether a particular increase in the cost of utilities or real estate taxes is reasonable and comparable to cost increases affecting other rental projects in the com-

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Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the "excess" funds derived from project operation were made available for the making of the additional assistance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expenses ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the "initial" ratios as of a date not later than 180 days after enactment of the bill.

S. Rep. No. 93-693, 93rd Cong., 2nd Sess. (1974), reported in 3 U.S. Code, Cong. & Admin. News, pp. 4273, 4343-04 (1974).

munity. But Congress hardly intended to give the Secretary blanket discretion to frustrate Congressional policy and in effect adopt a different policy which the Secretary might believe would result in more comprehensive and more equitable results."

On the record here the District Court below found that the Secretary abused the discretion conferred upon her under Section 236(f)(3) and (g) in declining to make the subsidy payments requested to Uplands on behalf of the tenants. Tenants were therefore granted a permanent injunction requiring the Secretary to make monthly subsidy payments of $9166.88,[4] commencing on May 1, 1975. The Secretary applied for and was denied a stay in the courts below, but did not apply for a stay in this Court. Thus as a result of the monthly operating subsidy being paid by the Secretary, Tenants for the past two years have been paying no more than 30% of their adjusted gross income in rent.

## ARGUMENT

### I.

### THIS CASE DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW.

The Secretary in her Petition For Certiorari contends that this case involves an important question of national housing policy because she has limited amount of contract authority and, if she is required to use that contract authority to make operating subsidy payments, she must divert it from other housing programs, which would then suffer from underfunding. The Secretary's

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[4]The $9166.88 figure was derived by HUD from analysis of the increased utility costs and real estate taxes above the initial operating expense level, as applied to the 424 member tenant class.

argument that this case presents an important question of federal law is therefore premised entirely on her contention that she must use contract authority to spend the reserve fund for operating subsidies. That contention was rejected by the courts below.[5] Each of the courts to which the Secretary has addressed this argument has disagreed with her. All of the courts have said that the reserve fund, which consists entirely of excess rentals contributed by Section 236 project owners, is not subject to contract authority limitations. The text of the statute, as amended in 1974,[6] makes no reference whatsoever to contract authority; rather it provides that the reserve fund is "to be used" by the Secretary "to make" operating subsidy payments. The legislative history is consistent with the position taken by the courts.[7] Thus, the Secretary's argument that this

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[5]To the same effect, see *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976); *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Abrams v. Hills*, 415 F. Supp. 550 (C.D. Calif. 1976); *Parker Square Tenants Association v. The Department of Housing and Urban Development*, ____ F. Supp. ____, C.V. No. 75CV577-W-3 (W.D. Mo. 1976).

[6]12 U.S.C. §1715z-1(g). (Petitioner's Appendix E, 40a).

[7]See S.Rep. No. 93-693, 93rd Cong., 2d Sess. (1974); H.Conf. Rep. No. 93-1279, 93rd Cong., 2d Sess. (1974). Both are reported in 3 U.S. Code Cong. & Admin. News 4273, 4302-04, 4375 (1974). See also S.Rep. No. 94-326, 94th Cong. 1st Sess. (1975). See particularly S.Rep. No. 94-749, 94th Cong. 2d Sess. (1976):

> The Committee was informed that there is approximately $125 million in unused authority available to provide interest subsidies and operating assistance *and, in addition,* approximately $44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. (Emphasis added.) S. Rep. No. 94-749, at p. 10.

case involved an important issue of housing policy because it requires her to choose among competing housing programs is simply false.

Further, the Secretary's argument that this case presents an important question of federal law because it involves the expenditure of over $50 million annually is misleading. While payment of operating subsidies nationwide might be that expensive, payment of operating subsidies to the single Section 236 project involved in this case costs less than $9,200.00 a month. For the Secretary to represent to the Court that this case involves an important question of national housing policy and to import into this case an alleged insufficiency of funds and resources to implement the operating subsidy program on a nationwide basis for some time in the future is to inject a host of speculative considerations which fall outside the record in this case. (See Petitioner's Appendix D, 36a-37a).

Because the Secretary can pay operating subsidies from the reserve fund without using contract authority, payment of operating subsidies will not interfere with other housing programs and resolution of this case therefore involves no major issue of national housing policy. And, since this case involves payment of subsidies to a single Section 236 housing project, the sums of money involved are not great enough to warrant attention by this Court.

## II.

### THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL.

Only one other Court of Appeals besides the court below has rendered a decision in a case involving implementation of the operating subsidy program and that court affirmed a District Court order requiring

payment of such subsidies. *Abrams v. Hills,* 547 F.2d 1062 (9th Cir. 1976). Thus, appellate decisions are unanimous.

Appeals from District Court orders requiring payment of operating subsidies are pending in two Circuits. *Underwood v. Hills,* C.A.D.A. Nos. 76-1603 and 76-1650, and *Dubose v. Hills,* C.A. 2 No. 76-1607. *Underwood* is a nationwide class action on behalf of all Section 236 tenants. It was argued in the Court of Appeals for the District of Columbia on February 22, 1977. The record in Underwood and the Secretary's argument on that record deal with the cost of implementing the operating subsidy on a nationwide basis; that argument is not apposite here. Until that case is decided, the Secretary cannot know what, if any, duty she has with respect to the $54 million balance in the reserve fund. It would thus be injudicious for the Court to grant the Secretary's petition in this case when the nationwide class action, containing in all probability a more extensive record and a more sophisticated development of the issues, has yet to be decided by the Court of Appeals for the District of Columbia.

## III.

## THE SECRETARY'S ARGUMENTS ARE WITHOUT MERIT.

The Secretary has repeatedly argued that the provisions of Section 236 grant her discretion to refuse to implement the operating subsidy program. The courts below and all the other courts before whom she has made this argument have held that the operating subsidy program is mandatory and have noted that even if the program were discretionary, the Secretary has

abused her discretion by refusing to pay any operating subsidies.[8]

The Secretary's other major argument is that she has limited contract authority and payment of operating subsidies would deplete her contract authority thereby interfering with other housing programs under Section 236. As already discussed above, the Courts have unanimously held that the Secretary does not have to use her contract authority to spend the reserve fund for operating subsidies.

In addition, the Secretary argues that passage of a recent statute – P.L. 94-378, 90 Stat. 1095 – (August 9, 1976) supports her view that contract authority is required to spend the reserve fund. That argument, too, has been rejected by the Court of Appeals below and by every court before which the Secretary has raised it. The Ninth Circuit Court of Appeals in *Abrams v. Hills, supra,* made a careful analysis of this point and rejected it, relying on a decision by the District Court in *Dubose v. Hills,* which also expressly rejected the Secretary's position.[9]

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[8] *Dubose v. Hills, supra; Harrison v. Hills,* ____ F. Supp. ____ CV No. 75-938 (W.D. Pa. 1975); *Campbell v. United States Department of Housing and Urban Development,* ____ F. Supp. ____ CV No. 75-471 (N.D. Ohio 1975); *Abrams v. Hills, supra; Parker Square Tenants Association v. The Department of Housing and Urban Development, supra; Carberry v. Hills,* ____ F. Supp. ____, CV No. 76-521-F (D. Mass. 1976); *Gertsch v. Hills,* 414 F. Supp. 15 (D. Utah 1976); *Sicuro v. Hills,* 415 F. Supp. 553 (C.D. Cal. 1976); *Battles Farm v. Hills, supra; Underwood v. Hills, supra.*

[9] The Court in *Abrams* stated:

> The Secretary argues that the above language [in P.L. 94-378] makes it clear that contract authority is required before any of the money in the reserve fund may be utilized. We can answer this argument no better than did

[footnote continued]

Therefore, because so many judges have considered the arguments here raised by the Secretary and have consistently rejected them it is reasonable to conclude that these arguments are without merit.

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the court in *Dubose v. Hills*, 420 F. Supp. 399 (D. Conn. 1976):

> The premises of this argument is that the reserve fund can be spent only pursuant to contract. In my earlier consideration of this issue, I reviewed the statutory language and the legislative history and concluded that "direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority." However, the defendants now argue that the proviso of Public Law 94-378, which states that the reserve fund shall be available "for payments on contracts entered into pursuant to the authorities enumerated above," supports their position that the reserve fund can only be spent pursuant to contract authority.
>
> The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the programs enumerated in Public Law 94-378, including interest reduction payments under the Section 236 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can only be spent pursuant to contract. (420 F. Supp. at 401-02).

Our holding on this issue is thoroughly fortified by the Conference Report explaining the Committee's action in restoring the proviso (after it had been struck by the Senate):

> Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.

[footnote continued]

For the foregoing reasons, it is respectfully submitted that the Secretary's Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

LAWRENCE B. COSHNEAR

April 27, 1977

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The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area.

H.R. Report No. 94-1362, 94th Cong., 2d Sess. (1976). It therefore quite clearly appears that Congress did not intend that P.L. 94-378 should forestall such relief as was here ordered by the District Court. *Abrams v. Hills, supra,* at 1071-1072.